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FILED/ACCEPTED

NOV - 9 2007

Federal Communications Commission
Office of the Secretary

November 9, 2007

Marlene H. Dortch
Secretary
Federal Communications Commission
236 Massachusetts Avenue, NE
Suite 110
Washington, D.C. 20002

RE: Motion to File an Additional Pleading; EB Docket No. 07-197

Dear Madame Secretary:

Enclosed for filing on behalf of parties Kurtis J. Kintzel, Keanan Kintzel, and all other Entities by which they do business before the Federal Communications Commission, is the original and 6 copies of the Motion to file an Additional Pleading, in the above-referenced matter.

Sincerely,

Catherine Park, Esq.

Catherine Park, Esq.

Enclosures: Original + 6 Copies

No. of Copies rec'd 0 + 6
List ABCDE

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FILED/ACCEPTED
NOV - 9 2007
Federal Communications Commission
Office of the Secretary

In the Matter of)	
)	
Kurtis J. Kintzel, Keanan Kintzel, and all)	EB Docket No. 07-197
Entities by which they do business before the)	
Federal Communications Commission)	
)	
Resellers of Telecommunications Services)	
)	
To: Presiding Officer, Richard L. Sippel)	
(Chief ALJ))	

**MOTION TO FILE AN ADDITIONAL PLEADING IN OPPOSITION TO NASUCA'S
PETITION TO INTERVENE AS A PARTY, BASED ON NEWLY DISCOVERED FACT**

Kurtis J. Kintzel, Keanan Kintzel, and all Entities by which they do business before the Federal Communications Commission ("the Kintzels, et al.") hereby submit this Motion to File an Additional Pleading in Opposition to NASUCA's Petition to Intervene as a Party, based on the emergence of a newly discovered fact. Such newly discovered fact reveals a situation of such substantial risk to the rights of the accused to a fair hearing that the Kintzels, et al., request permission to file an additional pleading, in the interests of justice.

**I. NASUCA is not independent of the FCC, and its participation as an adverse party
would taint the validity of the proceedings.**

The newly discovered fact is the following: Kathleen F. O'Reilly, counsel to NASUCA, was a member of the FCC's Consumer/Disability Telecommunications Advisory Committee.¹

¹ Transcript of FCC's Consumer/Disability Advisory Committee meeting, Aug. 6, 2001, at <http://www.fcc.gov/cgb/cdtac/080601transcript.html>.

The involvement of a former member of an FCC advisory committee as legal counsel to NASUCA, which is seeking to become an adverse party against the Kintzels, et al., presents the potential for collusion and improper influence between the Commission's Enforcement Bureau and NASUCA should the Petition to Intervene be granted. The advisory committee of which NASUCA's legal counsel was a member was instrumental in formulating FCC policy on issues central to the hearing, e.g., the universal service fund contributions.² Because alleged non-payment of the universal service fund contributions is an issue designated for the hearing, and because the calculation of such contributions—and legal determination as to when liability for such contributions actually accrues—are critical aspects of defense arguments, the participation of NASUCA's legal counsel in assisting in formulating FCC policy on that issue, and now participation as counsel to an organization purporting to be independent of the FCC, rather than merely an arm of the FCC, on that issue, creates the appearance of improper collusion.

The transcript of the advisory committee's meeting on August 6, 2001 indicates that two Commissioners attended the meeting (Michael Copps and Kevin Martin).³ The transcript also indicates that the committee was very ambitious about getting its recommendations adopted ("Ms. Rooker: We're being very ambitious for a new group in that we're trying to reach a consensus and make recommendations to the Commission on Universal Service Fund."⁴). The committee meetings apparently were held at the FCC building,⁵ and during the August 6, 2001 meeting, a "continental breakfast and lunch" were provided to the committee members paid for by Cingular Wireless⁶; "travel expenses" of some members were paid for by NCR Ideal; and

² *Id.*

³ Transcript of FCC's Consumer/Disability Advisory Committee meeting, Aug. 6, 2001, at <http://www.fcc.gov/cgb/cdtac/080601transcript.html>.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

Sprint “generously contributed teleconferencing services.”⁷ Sprint is a competitor of the Kintzels, et al.

The fact that committee meetings were held in the FCC building, with benefits provided by corporate sponsors, and partaken of, willingly, by two Commissioners, consumer groups, and associations, suggests that the advisory committee was a joint venture of sorts between the FCC and private entities. To argue that the advisory committee was independent of the FCC is simply not credible.

If NASUCA is denied intervention as a party, but permitted to give evidence as a non-party, under 47 C.F.R. § 1.225(b), or deposed under the discovery rules (since non-parties can be deposed by any party, under 47 C.F.R. § 1.315), NASUCA could still contribute its evidence without undermining the validity of the instant proceedings due to the potential for collusion and improper influence, and attempts to put forth the insupportable contention that there are two prosecutors, when there would be in effect only one.

Apparently NASUCA has opposed the FCC in previous proceedings; however, its position in previous proceedings is irrelevant. NASUCA is united with the FCC in the instant proceeding, and the Kintzels, et al., present the evidence of that unity, which poses a serious risk to the rights of the accused to a fair hearing. The substantial injustice that would result from a proceeding in which \$50 million in penalties is proposed against the accused by one prosecutor, claiming to be two independent prosecutors, in an effort to lend credibility to the proceedings, is the worst kind of theater.

NASUCA’s previous attempts to prosecute the Kintzels, et al., in Ohio, were also mere theater. NASUCA’s Reply brief asserts that “the fact that Buzz Telecom chose not to defend itself in Ohio does not diminish the gravity of the Ohio decision.” Opp., p. 3. The Reply brief

⁷ *Id.*

claims that Buzz was given every opportunity to defend itself in Ohio, but neglects to mention that, during the week of the scheduled hearing, a snowstorm hit Ohio, and the hearing was delayed at the request of the Ohio attorneys. Kurtis J. Kintzel planned to attend the hearing, but when his daughter was involved in a car accident two days before the rescheduled hearing, Mr. Kintzel called the ALJ in Ohio to seek a postponement, which the ALJ denied. Mr. Kintzel was also denied the opportunity to participate by conference phone.

NASUCA's Reply brief suggests that the Kintzels, et al., had no regard for the proceedings against them in Ohio. Rather, it was Ohio that completely disregarded the due process rights of the accused by denying them the opportunity to present any defense at all. Because of the financial difficulties that Buzz was undergoing, it was not able to pay for legal counsel. Because of a series of acts of God (snowstorm, delay of hearing, daughter's car accident), Mr. Kintzel could not attend the hearing in person. The fact that the ALJ in Ohio delayed the hearing at the request of the Ohio attorneys, but refused Mr. Kintzel's request to delay the hearing, and further omitted, in the written Opinion and Order, all facts about the rescheduling and attempts by the defendants to participate, makes the Opinion and Order extremely vulnerable on constitutional grounds.

The Kintzels, et al., should be permitted to file an additional pleading in opposition to NASUCA's Petition to Intervene, to prevent NASUCA from putting on another theatrical display that could place the due process rights of the accused at serious risk.

II. NASUCA is further tainted because its legal counsel, while a member of the FCC advisory committee, accepted benefits from a corporate competitor of the Kintzels, et al.

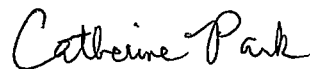
Members of that FCC advisory committee accepted benefits from corporate sponsors

such as Cingular Wireless, NCR Ideal, and Sprint.⁸ Sprint is a competitor of the Kintzels, et al. NASUCA is seeking to exert prosecutorial powers against the accused, although its legal counsel received benefits from corporate sponsors who were competitors of the accused. The situation creates the appearance of impropriety along a second line, i.e., since the FCC is seeking to revoke the operating authority of the accused, a revocation would benefit corporate competitors. Because at least one competitor (Sprint) has provided benefits to NASUCA's legal counsel, it creates the appearance that NASUCA is in league with such competitors to put the accused out of business, although NASUCA claims to be an independent consumer group, free from corporate influence.

III. Conclusion.

For all of the foregoing reasons, the Kintzels, et al., respectfully request permission to file an additional pleading in opposition to NASUCA's Petition to Intervene as a Party, based on the newly discovered fact.

Respectfully Submitted,



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⁸ *Id.*

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to File an Additional Pleading in Opposition to NASUCA's Petition to Intervene as a Party Based on Newly Discovered Fact was sent for filing, by hand-delivery, this 9th day of November 2007, to the following:

Marlene H. Dortch
Secretary
Federal Communications Commission
236 Massachusetts Ave., NE
Suite 110
Washington, D.C. 20002

And served by U.S. Mail, First Class, on the following:

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